

temperatures for a period of at least 3 months. At least 3 months include 3 months up to years and there is no evidence in the specification to show that the product has a shelf life at refrigeration temperatures for years."

Applicants respectfully disagree. Applicants have enabled the invention by showing that the products have a shelf life of at least about 3 months. That is all Applicants should be required to show. The limitation of "at least about 3 months" is intended to distinguish over products having a **shorter** shelf life. The Examiner's argument concerning a "shelf life at refrigeration temperatures for years" is not relevant. One of ordinary skill in the art would clearly understand that a product having a shelf life less than about 3 months would not fall within the claim and that a product having a shelf life of at least 3 months, assuming all other limitations are met, would fall within the claim. One of ordinary skill in the art would not expect any bread product, including the one of the present invention, to have a shelf life of years. Thus, Applicants respectfully submit that the enablement argument presented by the Examiner is not well reasoned or particularly relevant. Applicants are not trying to claim a bread product having a shelf life of years. Applicants have shown a bread product having a shelf life of at least 3 months. This is a significant advancement in the art. Applicants respectfully request that this rejection be withdrawn.

As amended, Claims 9-15 are in proper form and meet the requirements of 35 U.S.C. §112. Applicants respectfully request that this rejection be withdrawn.

2. Rejection of Claims 1-7 under 35 U.S.C. §103(a)

Claims 1-15 were rejected by the Examiner as being obvious under 35 U.S.C. §103(a) over Feldmeier et al. (U.S. Patent 6,048,558) in view of Loose (U.S. Patent 969,173), Goglanian (U.S. Patent 5,045,329), Cochran et al. (U.S. Patent 5,747,084), The Encyclopedia of Chemical Technology, Baking Science & Technology, and Atwell (U.S. Patent 5,792,499).

Applicants assert that Examiner's rejection of Claims 1-15 is improper because none of the cited references teach or suggest the combination of elements of the claimed invention. The Federal Circuit has stated that it is necessary, in order

to support a rejection of claims under §103(a) using a combination of references, that there be a teaching or suggestion in one or more of the cited references to combine the elements of the claimed invention. *In re Dow Chemical Co.*, 5 U.S.P.Q.2d 1529 at 1531-32 (Fed.Cir. 1988); *ACS Hospital Systems, Inc. v. Montefiore Hospital et al.*, 221 U.S.P.Q. 929 at 933 (Fed.Cir. 1984); *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 220 U.S.P.Q. 303 at 311 (Fed.Cir. 1983). The mere fact that the prior art can be modified does not make the modification obvious, unless the prior art taught or suggested the desirability of the modification. *In re Gordon*, 221 USPQ 1125 (Fed. Cir. 1984).

The primary reference Feldmeier et al. discloses a method of imparting resistance to moisture and texture degradation in baked flour-containing goods packaged as a meal, in the form of a kit prepared for storage at refrigerated conditions. The meal kit may optionally contain other foods in addition to the flour-containing component. Resistance to moisture and texture degradation is achieved by treating at least one compartment of the kit package with an **anti-fogging agent** which prevents staling of the flour-containing component by facilitating the evaporation of moisture which may collect inside the package. As noted in Feldmeier et al., the anti-fogging agent is an important aspect of the method which allows a relatively long shelf-life. Col. 4, lines 15-29; col. 5 lines 18-32.

The longest shelf life reported in Feldmeier et al. is "at least 60 days."¹ It is noted that when the baked products are "packaged as described herein [i.e., using the anti-fogging agent], longer shelf lives will be obtained to retard staling and off-flavors." Col. 3 lines 36-43. The increase in shelf life due to the anti-fogging agent does not appear to be reported in Feldmeier et al. Clearly, however, removing the anti-fogging agent from the package of the Feldmeier et al. bread product would reduce the shelf life.

¹ Elsewhere, Feldmeier et al. notes that using their invention "acceptable taste, texture and appearance properties are maintained in the baked component . . . for extended time periods. For example, these properties are maintained when the packaged product is stored under refrigerated conditions . . . for **several weeks**." Col. 7, lines 61-66 (emphasis added). Thus, it is not clear whether the shelf life of the Feldmeier et al. bread product is "several weeks" or "at least 60 days."

Goglanian discloses a pita bread which is scored down the center prior to baking to form a line of weakness in the final product, which allows the pita bread to be torn along the line of weakness. The score line, applied before baking, prevents the occurrence of a "baking-induced rupture," which forms in traditional pita bread manufacturing. Goglanian is not related to preparing bread products having extended shelf lives under refrigerated conditions.

Loose discloses a biscuit or cracker with a broken or interrupted zone of weakness, along which the biscuit may be separated into a predetermined number of pieces. Loose is not related to preparing bread products having extended shelf lives under refrigerated conditions.

Cochran et al. discloses a ready-to-assemble, ready-to-eat packaged pizza kit wherein a baked pizza crust is provided having a water activity in the range of about 0.6-0.85, the baked crust being suitable for use in a refrigerated ready-to-eat pizza kit. The pizza kit also includes a pizza sauce component and a plurality of pizza toppings, which are hermetically sealed in separate sections of a package having a compartmentalized base tray and a fitted top sealed to the base tray. As pointed out by the Examiner, Cochran et al. also teaches that many baked goods have a water activity of about 0.90-0.98. However, it must be noted that these baked goods are the ones which are not suitable for refrigerated kits. Cochran et al. provides a dough formulation, in Baker's percentages, as follows: 100 pounds flour, 50-60% water, 4-5% vegetable oil, 4-5% solid vegetable shortening, 1-1.5% salt, 2-3% sugar, and 0.3-0.7% dried yeast. Col. 4, lines 24-27.

The portion of the Encyclopedia of Chemical Technology relied upon by the Examiner is related to the use of salt in bread making. With regard to shelf life of such bread products, it is indicated that for "long shelf life foods such as crackers, it is important to use salt that is refined to minimize trace levels of iron and copper, since these tend to promote fat oxidation." (Vol. 3, p. 882.)

The portion of Baking Science & Technology relied upon by the Examiner is related to the use of dough conditioners in bread making. Although it is noted that such dough conditioners provide "extended keeping properties," there is no

indication that they would allow shelf lives of at least three months under refrigerated conditions.

Atwell is related to a method for increasing the storage stability of refrigerated **dough**. It is **not** directed to methods for increasing the storage stability of baked goods under refrigerated conditions.

The present invention is directed to a soft, fully baked breadstick which can be baked, refrigerated and served cold or reheated without becoming leathery, dry stale and/or tough. The breadstick product has a water activity of about 0.9-0.95, and will retain satisfactory texture and chewability characteristics throughout its shelf-life. As noted in the specification and required in claims 7-15, the shelf life of the fully baked breadsticks is "at least three months." The breadstick product of the present invention is especially adapted to for use in a "single-serve" kit, which provides other snack or lunch-type food products or components. Such components include pizza sauce, cheese and cheese products, cheese sauces, butter, margarine, jam, jelly, honey, peanut butter, olive oil, salad ingredients, meat products, etc. In a preferred embodiment, the breadstick product itself comprises at least two, integral and fully baked bread products wherein each fully baked bread product can be easily separated along perforations baked into the fully baked bread product in order to form two or more, and more preferably, only three, breadstick-shaped products. The breadstick product may be consumed in unseparated form as a loaf type bread product, or separated as individual breadsticks. Moreover, the breadstick product may be consumed directly from the package with or without further heating as desired by the consumer.

In combining the cited references to arrive at the current invention, the Examiner has cited Feldmeier et al. as the primary reference which teaches a kit containing a compartmentalized, hermetically sealed package with a refrigerated baked flour-containing component and other components. In order to provide the necessary modifications to arrive at the current invention, the Examiner combines the teachings of Feldmeier et al. with Goglianian and Loose which teach perforations in a baked flour or grain product. The Examiner refers to Cochran, for the teaching of a baked good with a water activity in the range of 0.9 to 0.98. The Examiner

refers to the Encyclopedia of Chemical Technology for the teaching of the use of salt in bread products and Baking Science & Technology for the use of dough conditioners in bread making. Finally, the Examiner relies upon Atwell for teaching the use of dough relaxers in refrigerated dough.

Applicants respectfully disagree that the combination of references is proper. Moreover, even if these references were properly combined, they would not provide the present invention. Regarding the teaching of a baked product with a water activity of 0.9-0.95 as required by the current invention, Feldmeier et al. is silent on water activity. In particular, Feldmeier et al. utilizes a specific dough formulation in combination with an anti-fogging agent to obtain the desired shelf-life.

The Examiner relies on Cochran et al. as teaching a baked good with a "water activity in the range of about 0.9-0.98." Col. 3, line 37-39. This use of Cochran et al. is improper. Cochran et al. in the portion relied on by the Examiner is referring to "[c]ommon baked goods," (Col. 2, lines 37-39) and not baked goods that would be suitable for a refrigerated, ready-to-eat kit. Cochran et al. requires a water activity of 0.6 to 0.85 in order to avoid the "leathery, dry, stale and/or tough" texture associated with the refrigeration of common baked goods. Col. 2, lines 31-35; col. 3 lines 34-50. This water activity, (i.e., 0.6 to 0.85) in combination with the specific dough formulation provide the desired texture which allow a refrigerated, ready-to-eat pizza product in Cochran et al. Thus, Cochran et al. **actually teaches away** from the use of baked goods having a water activity of 0.90 to 0.95 as required by the present claims. In the Office Action, the Examiner has completely ignored this aspect of Cochran et al. and merely argued that this reference teaches the use of water activities of about 0.9 to 0.98 without any regard to the specific teachings as outlined above. This is improper.

Moreover, combining Feldmeier et al. and Cochran et al. as suggested by the Examiner would not provide the present invention. One of ordinary skill in the art considering these references would have used the Cochran et al. reference as teaching a water activity of 0.6 to 0.85. Thus, one of ordinary skill in the art would have modified the baked good of Feldmeier et al. to obtain a water activity of 0.6 to 0.85, **not** the 0.9 to 0.98 water activity as suggested by the Examiner. Indeed, one

of ordinary skill in the art could combine the references in the manner suggested by the Examiner only with the use of hindsight based on the present specification. As the Examiner knows, such hindsight reconstruction is improper. *W.L. Gore & Associates, Inc. v. Garlock*, 220 U.S.P.Q. 303, 313 (Fed. Cir 1983).

The Examiner relies on the Goglanian and Loose references to provide a teaching for perforations in baked goods. However, neither of the references teaches or suggests the use of perforations in a refrigerated breadstick product packaged in a compartmentalized, hermetically sealed container or how to prepared baked goods having extending shelf lives under refrigerated conditions. The Examiner also relies upon the Encyclopedia of Chemical Technology for teaching the use of salt in baked products and Baking Science & Technology for teaching the use of dough conditioners. None of these references provide method for preparing baked goods having extending shelf lives under refrigerated conditions

As stated above, in order to support a rejection of claims under 35 U.S.C. §103(a), using a combination of references, it is not sufficient that the combination of references define the claimed invention. Rather, what is needed is a teaching or suggestion to combine elements to arrive at the invention **found in one or more of the prior art references**. None of the references the Examiner relies on contains any teaching or suggestion to combine the elements to arrive at the claimed invention. Therefore, the reliance on these references to sustain a rejection under §103(a) is improper.

The Examiner also indicated that the "exclusion of the anti-fogging agent does not define [the present invention] over Feldmeier et al." According to the Examiner,

"Feldmeier et al disclose the anti-fogging agent further assists in maintaining freshness and retarding staling. By this disclosure, they recognize that without the anti-fogging agent, the product still has shelf stability but the anti-fogging agent enhances the shelf life. Thus, it would have been obvious to one skilled in the art to exclude the [anti-]fogging agent depending on the cost/benefit factor."

The Examiner goes on to discuss the application of such a "cost/benefit factor" in eliminating the anti-fogging agent of Feldmeier et al.

Applicants respectfully disagree. One of ordinary skill in the art would actually be taught away from the present invention by the Feldmeier et al. disclosure. Resistance to moisture and texture degradation in Feldmeier et al. is achieved by treating at least one compartment of the kit package with an **anti-fogging agent** which prevents staling of the flour-containing component by facilitating the evaporation of moisture which may collect inside the package. As noted in Feldmeier et al., the anti-fogging agent is an important aspect of the method which allows a relatively long shelf-life. Col. 4, lines 15-29; col. 5 lines 18-32.

It is true, as the Examiner points out, that Feldmeier indicates that the anti-fogging agent "further assists in maintaining freshness and retarding staling." But, as noted above, the longest shelf life reported in Feldmeier et al. is "at least 60 days." Specifically, Feldmeier et al. notes that when the baked products are "packaged as described herein [i.e., using the anti-fogging agent], longer shelf lives will be obtained to retard staling and off-flavors." Col. 3 lines 36-43. Elsewhere, Feldmeier et al. notes that using their invention "acceptable taste, texture and appearance properties are maintained in the baked component . . . for extended time periods. For example, these properties are maintained when the packaged product is stored under refrigerated conditions . . . for **several weeks**." Col. 7, lines 61-66 (emphasis added). Thus, it is not clear whether the Feldmeier et al. product has a shelf life of about 60 days or only several weeks. Clearly, however, removing the anti-fogging agent from the package of the Feldmeier et al. bread product would reduce the shelf life. One of ordinary skill in the art, in seeking to provide a shelf stable bread product, would not be motivated to remove the anti-fogging agent since the shelf stability would be decreased. Moreover, one of ordinary skill in the art would not be motivated to remove the anti-fogging agent in order to achieve the shelf live (i.e., at least 3 months) of the present invention since he or she would realize that doing so would reduce the shelf life to some value below the values reported in Feldmeier et al. (i.e., less than 60 days or less than several weeks depending on one's reading of Feldmeier et al.). Thus, Feldmeier et al. actually **teaches away** from the present invention since it implicitly teaches that omission of the anti-fogging agent will provide a shelf life well below that required by the present claims.


As detailed above, the present invention is not obvious in light of the references cited by the Examiner. Applicants respectively request that this rejection be withdrawn.

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In view of the foregoing Applicants respectfully request that the Examiner allow claims 1-15, and pass the application to issue. If the Examiner believes that a personal or telephonic interview would be helpful to terminate any issues which may remain in the prosecution of the application, the Examiner is requested to telephone Applicants' attorney at the telephone number set forth below.

Respectfully submitted,

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